Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

EFRAIN DOMINGUEZ,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the propriety of initial joinder under Rule 8 of the Federal Rules of Criminal Procedure is determined on the face of the indictment alone, as is indicated by this Court's decisions in *Schaffer v. United States*, 362 U.S. 511 (1960) and *United States v. Lane*, 474 U.S. 438 (1986) and is the procedure in the Fifth, Seventh, Eighth and Ninth Circuits, or instead the government can rely on allegations and evidence beyond the indictment to support such joinder, as is permitted by the First, Third and D.C. (and now the Eleventh) Circuits?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. _____

EFRAIN DOMINGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Efrain Dominguez, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 13, 2000.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 13, 2000 is reported at 226 F.2d 1235 and is reproduced in the Petitioner's Appendix hereto at App. 1 at 1. The Order of the Eleventh Circuit Court of Appeals denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc entered in this case on January 9, 2001 is not yet reported and is reproduced in the Petitioner's Appendix hereto at App. 2 at 1.

JURISDICTION

The Opinion of the Court of Appeals for the Eleventh Circuit was entered on September 13, 2000. *See* App. 1 at 1. The Order of the United States Court of Appeals for the Eleventh Circuit denying the Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was entered on January 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> **(a) Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are

based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT OF THE CASE

Petitioner Dominguez was charged by superseding indictment with 28 counts of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846; conspiracy to money launder, in violation of 18 U.S.C. § 1956(h); money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A) and (B); use of a telephone facility in commission of a felony, in violation of 21 U.S.C. § 843(b) and (d); and mortgage fraud, in violation of 18 U.S.C. § 1014.[1] The superseding indictment broke down into two

[1] The indictment also sought forfeiture of any property constituting, or derived from, any proceeds of Dominguez's alleged violations of 21 U.S.C. § 846, 21 U.S.C. § 843 (b) and (d), 21 U.S.C. § 1956(h), and 21 U.S.C. § 1956(a)(1). The government dismissed the forfeiture counts at the end of the

sets of charges: those relating to an alleged cocaine conspiracy (Counts 1-24), and those alleging that Dominguez committed mortgage fraud by submitting falsified tax returns in order to influence two banks to refinance mortgages. (Counts 25-28).

There was nothing on the face of the superseding indictment that tied these two sets of allegations together. The closest the indictment came was a mention in the cocaine conspiracy count that drug activity took place at a specific apartment building. However, there was absolutely no indication in the mortgage fraud counts that this particular building was the subject of any of the loans allegedly obtained by fraud. There was nothing in the indictment to tie that apartment building to the alleged mortgage fraud. Notably, one of the alleged mortgage frauds occurred almost two years after the alleged drug conspiracy had ended.

Dominguez filed a pre-trial motion to sever the mortgage fraud charges under Rules 8(a) and 14 of the Federal Rules of Criminal Procedure. In response, the government claimed these offenses were all part of a common scheme or plan. The government alleged, without evidentiary support, that the mortgage fraud charges "arise out of and directly result from the defendant's narcotics trafficking activity." The government also claimed, without evidentiary support, that "the vast majority of the evidence that will be admitted at trial to prove all of the mortgage fraud counts will necessarily be admitted in the narcotics case to establish defendant's inexplicable wealth in light of his meager legitimate

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trial and they are not at issue in this appeal.

income." The district court denied the motion to sever. Defense counsel renewed the motion to sever repeatedly during trial.

This case was tried before a jury in June 1998. The evidence of the two categories of charges did not overlap at trial. Evidence of the drug-related charges consisted primarily of intercepted conversations and testimony from alleged co-conspirators who were cooperating with the government. No drugs were found in Dominguez's possession or introduced into evidence at trial. In contrast, the evidence of mortgage fraud involved documents and testimony from loan officers and tax preparers. This was a completely different set of evidence and a completely different cast of characters from those involved in the alleged drug conspiracy.

The evidence at trial did not show a link between the alleged drug conspiracy and the alleged mortgage fraud or that Dominguez's unexplained wealth from the alleged drug conspiracy provided the motive for allegedly falsifying the tax returns to obtain loans. There was no evidence that Dominguez was living beyond his means. Indeed, the whole idea behind the mortgage fraud counts was that Dominguez needed money to avoid losing the properties which he was seeking to refinance--the very opposite of unexplained wealth. The evidence showed that Dominguez used false tax returns for the mortgage applications simply because he never filed returns for those years. This was not a case where the narcotics proceeds were the same funds the government claimed were not disclosed on fraudulent tax returns. The tax returns had nothing to do with the drug conspiracy.

The jury returned a verdict of guilty on all counts except the money laundering counts. Over defense objection, the district court accepted a partial verdict. The government then moved to dismiss the money laundering counts. Thereafter, the district court sentenced Dominguez to 188 months' imprisonment and five years' supervised release.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed Petitioner Dominguez's conviction on September 13, 2000, reported at 226 F.3d 1235, holding that the drug-related and mortgage fraud-related charges were properly joined under Rule 8(a) of the Federal Rules of Criminal Procedure. The court recognized that "the indictment in this case does not explicitly allege any connection between the two groups of charges...." 226 F.3d 1235, 1239. However, the court held that whether joinder is proper under Rule 8 is not to be determined on the face of the indictment alone. The court looked beyond the indictment to the trial evidence and concluded that the trial evidence supported the government's position that concealing income from the alleged drug activity was the motive for the mortgage fraud and, therefore, joinder was proper under Rule 8.

Petitioner Dominguez petitioned the court for rehearing and suggested a rehearing *en banc*. That petition was denied by order dated January 9, 2001.

REASON FOR GRANTING THE WRIT

I.

Certiorari should be granted to answer the question of whether the propriety of initial joinder under Rule 8 of the Federal Rules of Criminal Procedure is determined on the face of the indictment alone, as is indicated by this Court's decisions in *Schaffer v. United States*, 362 U.S. 511 (1960) and *United States v. Lane*, 474 U.S. 438 (1986) and is the procedure in the Fifth, Seventh, Eighth and Ninth Circuits, or instead the government can rely on allegations and evidence beyond the indictment to support such joinder, as is permitted by the First, Third and D.C. (and now the Eleventh) Circuits.

The Eleventh Circuit's opinion in this case adopted a new interpretation of Fed.R.Crim.P. 8 that conflicts with this Court's decisions in *Schaffer v. United States*, 362 U.S. 511 (1960) and *United States v. Lane*, 474 U.S. 438 (1986), the Fifth, Seventh, Eighth and Ninth Circuits, and the text and purpose of Rule 8 itself. According to the Eleventh Circuit's interpretation of Fed.R.Crim.P. 8, the propriety of initial joinder under Fed.R.Crim.P. 8 is not

determined on the face of the indictment alone. More specifically, the Eleventh Circuit held that the drug-related and mortgage fraud-related charges in the indictment herein were properly joined under Fed.R.Crim.P. 8(a). The Eleventh Circuit recognized that "the indictment in this case does not explicitly allege any connection between the two groups of charges...." 226 F.3d 1235, 1239. However, the court held that, if the face of an indictment does not show that joiner is proper under Fed.R.Crim.P. 8, a district court considering a pre-trial Rule 8 severance motion should nevertheless look beyond the indictment to evidence proffered by the government before trial which the government claims is the basis for joinder and a Court of Appeals considering a claim of misjoinder under Rule 8 should look beyond the indictment to the evidence adduced during the trial. 226 F.3d at 1241. The Eleventh Circuit additionally held that the only time that a court should look to the face of the indictment alone when considering the propriety of joinder is when the face of the indictment itself shows that joinder is proper but the evidence adduced during trial shows that joinder was improper. *Id.*

The practical effect of this opinion is that while a district court can deny a Rule 8 motion pretrial, it cannot grant a Rule 8 motion pretrial unless the government confesses error. Essentially, the Eleventh Circuit's opinion reads Rule 8 out of the Federal Rules of Criminal Procedure.

Furthermore, the Eleventh Circuit's opinion conflicts with this Court's decisions in *Schaffer v. United States*, 352 U.S. 511 (1960) and *United States v. Lane*, 474 U.S. 438 (1986) in which this Court acknowledged that Rule 8 is a pleading rule, to be applied before trial solely by examining the allegations in the indictment. In

Lane, 474 U.S. at 447, this Court explained and discussed its earlier decision in *Schaffer*, *supra*, as follows:

> In *Schaffer v. United States*, 362 U.S. 511, 80 S. Ct. 945, 4 L.Ed.2d 921 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." *Id.*, at 516, 80 S. Ct. at 948. Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the *Schaffer* Court held that ***once the Rule 8 requirements were met by the allegations in the indictment***, severance thereafter is controlled entirely by Federal Rules of Criminal

> Procedure 14, which requires a showing of prejudice. *Id.*, at 515-516, 80 S. Ct. at 947-948. (emphasis added).

Thus, "*Schaffer* holds that, [under Rule 8], the validity of the joinder is to be determined solely by the allegations in the indictment." *See United States v. Grey Bear*, 863 F.2d 572, 576 (8th Cir. 1988)(*en banc*). If the allegations in the indictment demonstrate that joinder is proper, only then is after-the-fact evidence reviewed to determine whether or not joinder is nonetheless prejudicial under Fed.R.Crim.P. 14. Thus, under *Schaffer*, *supra*, facts beyond those set out in the indictment are reviewed not to determine misjoinder but only to determine prejudice.

Furthermore, in *United States v. Lane*, 474 U.S. 438 (1986), this Court reaffirmed that Rule 8 addresses the propriety of initial joinder as set forth in the indictment. *See id.* at 446-49. This Court then addressed the proper standards for post-trial review of misjoinder under Rule 8. The Court held that reversal for misjoinder under Rule 8 is required where "the misjoinder results in actual prejudice because it 'had substantial injurious effect or influence in determining the jury's verdict.'" *Id.* at 449 (citation omitted). Again, this Court looked at evidence beyond the indictment, including the evidence at trial, *only* to determine if the prejudice from Rule 8 misjoinder required vacating the convictions and *not* to determine the propriety of joinder under Rule 8.

Moreover, since there is a conflict among the circuits as to whether or not the propriety of joinder under Fed.R.Crim.P. 8 is determined solely by the allegations in the indictment, this issue is

ripe for review by this Court. In the Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals, the propriety of joinder under Rule 8 must appear on the face of the indictment. *United States v. Faulkner*, 17 F.3d 745, 758 (5th Cir. 1994); *United States v. Marzano*, 160 F.3d 399, 401 (7th Cir. 1998), *cert. denied*, 525 U.S. 1171 (1999); *United States v. Rawley*, 152 F.3d 831, 848 (8th Cir. 1998); *United States v. Grey Bear*, 853 F.2d 572, 573-577 (8th Cir. 1988)(*en banc*); *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990). In the First, Third and D.C. Circuits, and now the Eleventh Circuit, a court can determine the propriety of joinder under Rule 8 by looking beyond the indictment to the government's representations and evidence. *United States v. Talavera*, 668 F.2d 625, 629 (1st Cir.), *cert denied*, 456 U.S. 978 (1982); *United States v. McGill*, 964 F.2d 222, 240-41 (3d Cir), *cert. denied*, 506 U.S. 1023 (1992); *United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir.)(*per curiam*), cert. denied, 522 U.S. 831 (1997). The law concerning this issue in the Second Circuit is unsettled. *Compare United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988)("In evaluating the defendant's claims of misjoinder under Rule 8(b) ... our task is limited simply to determining whether the indictment properly alleged their participation in a RICO conspiracy."), *with Pacelli v. United States*, 588 F.2d 360, 367 n. 20 (2d Cir. 1978)("necessary linkage" between coconspirators, while possibly absent from the face of the indictment, could be "established by the evidence presented at trial"). The other circuits do not appear to have addressed the issue. Some courts have expressly acknowledged that there is a conflict in the circuits as to whether or not the propriety of joinder under Rule 8 is determined solely by the allegations in the indictment. *See United States v. Halliman*, 923 F.2d 873, 883 n. 7 (D.C. Cir. 1991); *United States v. Richards*, 94

F.Supp.2d 304, 308-09 (E.D.N.Y. 2000). Petitioner contends that, the Fifth, Seventh, Eighth and Ninth Circuit Courts of Appeals have adopted the better reasoned view.

In addition, it is noteworthy that Fed.R.Crim.P. 8 is in the section of the Rules of Criminal Procedure entitled "Indictment and Information." Rule 8(a) refers to permitting two or more offenses to be "*charged* in the same *indictment* ... if the offenses *charged* ... are of the same or similar character or are based on the same act or transaction...." Rule 8(b) refers to permitting defendants to "be *charged* in the same *indictment* ... if they are *alleged* to have participated in the same act or transaction...." (Emphasis added). Rule 8 itself thus refers solely to the indictment's allegations and charges as the basis for determining the propriety of joinder. Rule 8, on its face, is plainly about pleading rather than proof. *See e.g. Grey Bear*, *supra*, 863 F.2d at 576.

It is also important to note that a severance motion must be raised pretrial. Fed.R.Crim.P. 12(b). District courts faced with the Eleventh Circuit's opinion herein will not know how to handle Rule 8 motions. Under the Eleventh Circuit's new interpretation, the government's proffered explanation, without any evidence to support it, is sufficient to deny severance. Furthermore, because the Eleventh Circuit opinion herein makes the evidence presented at trial relevant to the determination of Rule 8 joinder, a district court considering a pre-trial severance motion based upon Rule 8 must wait to see what evidence is presented at trial. Thus, the practical effect of the Eleventh Circuit's opinion is that, while a district court can deny a Rule 8 motion pretrial, it cannot grant a Rule 8 motion pretrial unless the government confesses error.

In the event that this Court grants this petition and holds that the propriety of joinder under Fed.R.Crim.P. 8 must appear on the face of the indictment, the Petitioner contends that the trial court erred in denying his motion to sever the drug-related counts from the mortgage fraud-related counts because, as previously explained, there is simply nothing in the indictment to tie the drug-related counts to the mortgage fraud-related counts, or vice versa.

CONCLUSION

Petitioner Efrain Dominguez respectfully requests that this Court grant his Petition for Writ of Certiorari for all of the foregoing reasons, including that the Eleventh Circuit's opinion herein conflicts with this Court's decisions in *Schaffer v. United States*, 362 U.S. 511 (1960) and *United States v. Lane*, 474 U.S. 438 (1986), the Fifth, Seventh, Eighth and Ninth Circuits and the text and purpose of Fed.R.Crim.P. 8 itself.